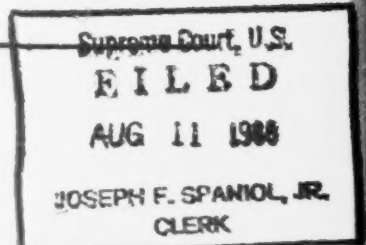


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No. 87-2061

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988



DOROTHY COLLINS, *etc.*,
Petitioners

vs.

PATRICIA K. BARRY,
Director of the Ohio Department of
Human Services,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF
IN OPPOSITION TO CERTIORARI

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ARGUMENT IN REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

I.

The question presented herein was neither presented in Gilliard nor decided by the Court in footnote 12 of its opinion therein.

Respondent Barry contends that the question presented herein was decided by this Court in footnote 12 of its opinion in Bowen v. Gilliard, 107 S.Ct. 3008 (1987). But, she has read far too much into that footnote.

In Gilliard, a direct appeal, the principle question presented was whether a provision of the Deficit Reduction Act of 1984 ("the DEFRA amendment") violated the due process or taking clauses of Fifth Amendment. 107 S.Ct. at 3011. No question concerning the civil contempt authority of the district court was presented by the facts of the appeal or

by the parties; 1/ none was raised by the Court itself.

While it is true that, in footnote 12, this Court reversed the district court's award of retroactive relief, the reversal was mandated by the unique circumstances of that case; circumstances which did not present the civil contempt question presented herein. In Gilliard the rights of the appellees had been adjudicated in 1971 under the then-existing statute and a permanent injunction had been entered. 107 S.Ct. at 3012; Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Gilliard v. Kirk, 633 F. Supp. 1529, 1543-42 (W.D.N.C. 1986), rev'd, 107 S.Ct. 3008 (1987). After the enactment

1/
The Gilliard appellants made this plain in their reply brief at 16-17.

of the DEFRA amendment, the appellees sought to obtain further relief. 107 S.Ct. at 3012; 633 F. Supp. at 1532-33. The district court found that statutory rights of the appellees had been changed in 1984 by the DEFRA amendment but that the DEFRA amendment violated the Fifth Amendment rights of the appellees. 107 S.Ct. at 3014; 633 F. Supp. at 1548-63. The district court, then, granted retroactive relief because it found that the DEFRA amendment had violated appellees' Fifth Amendment rights; not because appellees' rights under the injunction had been violated.

The unique circumstances in Gilliard thus mandated that this Court reverse the award of retroactive relief because of its determination that the constitutional rights of the appellees

had not been violated. 107 S.Ct. at 3015 n.12. No other basis was presented upon which the retroactive award could have been affirmed. The Court was not required to consider the question presented herein.

The instant case is quite different. Here, the district court held respondent Barry in civil contempt for her direct violation of the rights of the petitioners under the lawfully issued, unvacated 1971 permanent injunction. The award of damages was to compensate petitioners for the violations of the rights adjudicated in that injunction. Thus, the petition for writ of certiorari squarely presents a question not addressed by the Court in Gilliard at footnote 12.

II.

In Wheeling Bridge this Court recognized that an enjoined party may be held in civil contempt and that compensatory damages may be awarded against it for its violation of a lawfully issued, unvacated injunction, notwithstanding post-judgment legislation.

Respondent Barry reads Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856), to support the Sixth Circuit's decision herein. But, she has misunderstood that opinion.

In Wheeling Bridge an injunction was prospectively dissolved on defendants' motion because of post-judgment legislation. Defendants' bridge reconstruction, though previously enjoined, was thus permitted to continue. Wheeling Bridge, then, establishes the power of a court to prospectively modify a final decree in response to post-judgment legislation. Pasadena City Bd.

of Ed. v. Spangler, 427 U.S. 424, 437 (1976); System Federation No. 91, Railway Employees' Dept. v. Wright, 364 U.S. 642, 646 and 650 (1961). 2/

But Wheeling Bridge does not hold, as respondent Barry would have it, that a post-judgment change in a statute underlying the injunction renders the injunction unenforceable in civil contempt proceedings and that it thus prevents a court from awarding compensatory damages for violations of the injunction which occur prior to its vacation. On the contrary, in Wheeling Bridge the Court made it plain that it had the discretion to hold defendants in

2/
None of the opinions cited by respondent Barry at 2-3 of her brief in opposition support her understanding of Wheeling Bridge. All support the proposition stated here by petitioners.

contempt for pre-vacation violations of the injunction and to grant plaintiff's motion for attachment and sequestration. A majority of the Court declined to do so under the circumstances of the case, but four members firmly believed that the attachment should have been awarded against defendants for their disobedience to the injunction. Thus, Wheeling Bridge does not protect the scofflaw. 3/

It is this discretion, the discretion of a court to award compensatory damages in civil contempt, which the Sixth Circuit has foreclosed. The Sixth Circuit here reversed as a

3/
Moreover, Wheeling Bridge lends strong support to the propositions stated and arguments made by petitioners in the petition for writ of certiorari at 15, 18-19, and 22.

matter of law, not for abuse of discretion. It thus foreclosed the right of the district court to exercise its discretion whether to hold respondent Barry in civil contempt. There is no support in Wheeling Bridge for that result. Indeed, that result conflicts with the approach taken by this Court in Wheeling Bridge.

III.

Respondent Barry has cited no opinion which support the Sixth Circuit's holding herein.

The balance of the opinions cited by respondent Barry, those at 5 and 6 of her brief in opposition, are cited in support of propositions of law which are inapposite both to the facts and the question presented herein. Those opinions concern different facts and a

different question: the limits of a court's civil contempt authority where the order which has been violated was erroneously or unlawfully issued in the first place. Here, however, the permanent injunction which respondent Barry admittedly violated was correctly and lawfully issued. The question presented herein thus concerns the civil contempt authority of a district court where a correctly and lawfully issued order is violated before it is prospectively vacated.

CONCLUSION

For these reasons and for those in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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